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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

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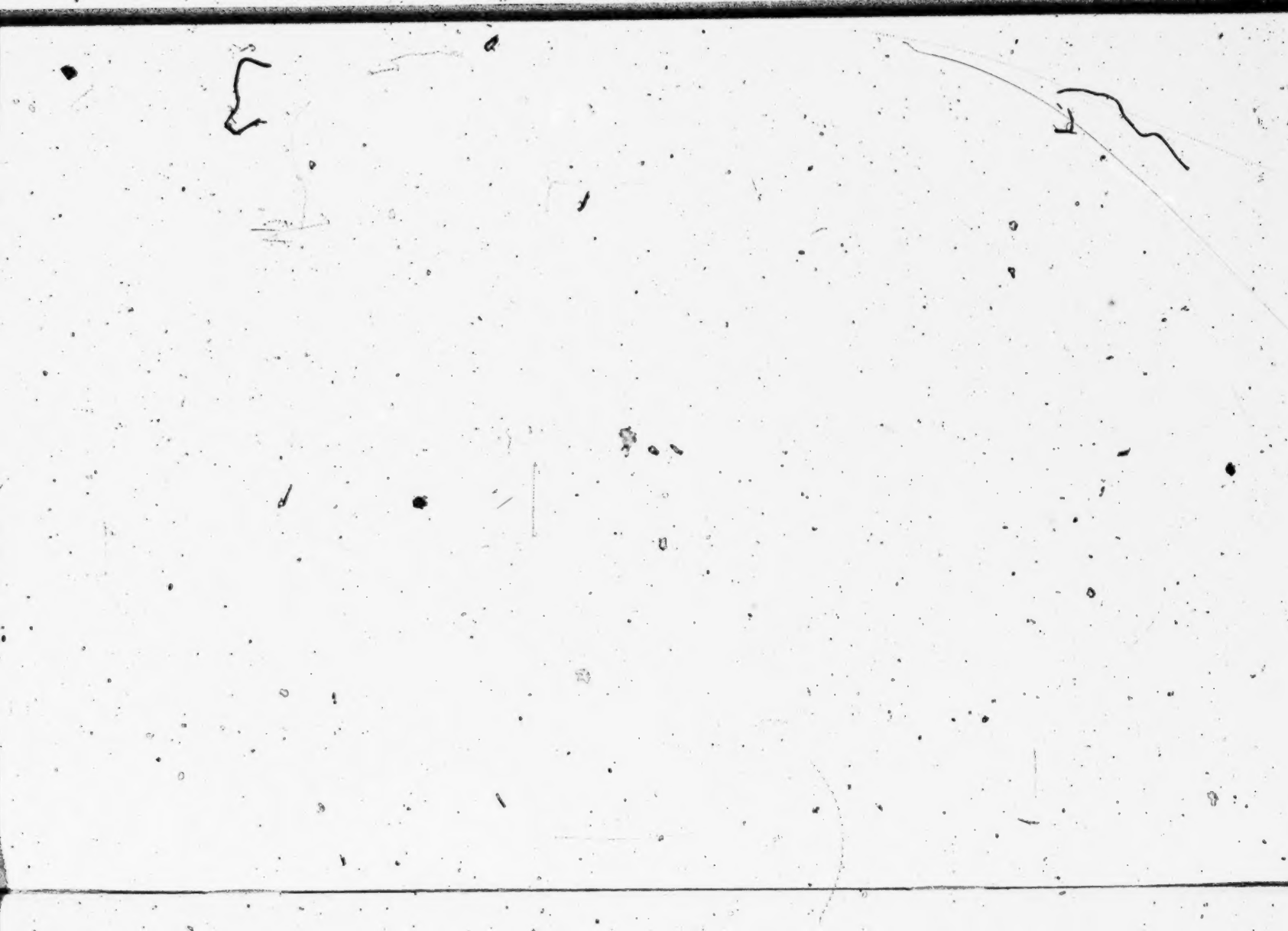

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IN THE

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OCTOBER TERM, 1967

No. 688

SIDNEY STREET,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

Opinions Below

The opinion of the New York Court of Appeals (A-3) is reported at 20 N. Y. 2d 231, 282 NYS 2d 491 (1967). Neither the Criminal Court of the City of New York (Kings County) nor the Appellate Term of the Supreme Court of the State of New York rendered an opinion herein.

Jurisdiction

The judgment of the New York Court of Appeals affirming the judgment of the Appellate Term of the Supreme Court of the State of New York which, in turn, had affirmed the judgment of conviction of the appellant by the Criminal Court of the City of New York (Kings County)

of a violation of Section 1425(16)(d) (malicious mischief) was entered on July 7, 1967. Appellant appealed to this Court on August 30, 1967. Probable jurisdiction was noted by this Court on June 17, 1968. 36 USLW 3483.

The jurisdiction of this Court rests on 28 U. S. C. Section 1257(2).

Questions Presented

1. Does New York's flag desecration statute violate the basic tenets of the "void for vagueness" doctrine in that it a) purports to sweep within its ambit conduct which is clearly protected by the First and Fourteenth Amendments; b) fails to afford adequate notice of the scope of its proscription and c) fails to provide adequate standards for enforcement?

2. May New York State constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country?

Statement of the Case

This appeal challenges the constitutionality of §1425, subdivision 16, paragraph (d), of the Penal Code of the State of New York.* The statute, on its face prohibits an individual from using words or acts in public to "mutilate, deface, defile, or defy, trample upon, or cast contempt upon" the flag, standard, color, shield or ensign, or any picture

* In connection with a revision of the Penal Law, Section 1425 was transferred in its entirety in September 1967 to the General Business Law as Section 136. The wording remains unchanged.

or representation thereof of the United States of America or the State of New York.

The appellant, a Negro, Sidney Street, is a veteran of World War II, and recipient of the Bronze Star (A-22).* He holds a responsible position with the New York City Transit Authority, is married and has no prior criminal record of any kind (A-21).

Sometime between 6 and 7 p.m. on Monday, June 6, 1966, Street was sitting in his Brooklyn apartment listening to the radio when he heard a news announcement that James Meredith had been shot during his march through Mississippi (A-22).

Street went to a bureau drawer and carefully took out an old 48-star American flag that some years before had been presented to his wife after its use to drape the coffin at the burial of her step-father, a veteran who had been revered by both Street and his wife (A-23).

Street carried the flag, which he and his wife had used on many occasions to celebrate national holidays, to the intersection of Lafayette Avenue and St. James Place, one block from his residence (A-23).

Street first carefully laid a piece of paper on the sidewalk; then, keeping the flag properly folded and holding it in one hand, he set it on fire with a match (A-23). He held the burning flag in his hand as long as he could, then laid it carefully on the piece of paper so that it would not touch the sidewalk (A-23).

A police officer in a passing patrol car saw the smoke from the fire, stopped to investigate, and saw the burning flag (A-23). After talking with various people who had

* All page references are to appellant's Appendix.

gathered around the flag, the officer saw Street, and heard him say "We don't need no damn flag" (A-17). The officer asked Street if he burned the flag, and Street replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag" (A-17).

The officer put out the fire, took the unburned portion of the flag, and arrested Street (A-17). Street was later charged with two crimes. One of the charges against Street was for disorderly conduct. The other was a charge that he had engaged in:

> "Malicious mischief in that defendant did wilfully and unlawfully defile, cast contempt upon and burn an American Flag, in violation of 1425(16)(d) of the Penal Law under the following circumstances: On the aforesaid date, place and time, the defendant did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, we don't need an American Flag'."

Street was acquitted of the charge of disorderly conduct, but convicted of violating section 1425(16)(d) of the Penal Law, and it is from this conviction that Street now appeals (A-25).

The arresting officer testified that Street's actions did not cause the sidewalk to become obstructed. There was no obstruction of vehicular traffic (A-20). Those persons who stopped to observe defendant's activities did not become unruly (A-20).

Statute Involved

New York State Penal Law, §1425 (now Section 136, General Business Law):

"16. Any person, who

a. • • •

b. • • •

c. • • •

d. Shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either by words or act, [any such flag] • • •

e. • • •

f. • • •

g. • • •

Shall be deemed guilty of a misdemeanor; • • •"

"The words flag, standard, color, shield or ensign, as used in this subdivision or section, shall include any flag, standard, color, shield or ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York."

Summary of Argument

The present case poses two issues for the Court's consideration. First, may the state constitutionally impose penal sanctions upon an individual charged with destroying or damaging an American flag in an attempt to dramatize his concern with social conditions existing in the country? Second, if such penal sanctions are constitutional, what is the permissible scope of conduct which such a statute may purport to prohibit; and how must such conduct be described?

Since the New York statute at issue herein violates the basic tenets of the "void for vagueness" doctrine articulated by this Court over the years in that it a) purports to sweep within its ambit communication which is clearly protected by the First Amendment, b) fails to afford adequate notice of the scope of its proscription and c) fails to provide adequate standards for enforcement, and is therefore subject to arbitrary and discriminatory application, its invalidity may be determined without reaching the more difficult question of whether a narrowly drawn, precise statute would violate the Constitution.

Even if the statute at issue herein were narrowly and precisely drawn, it could not constitutionally proscribe the defendant's activities. To the extent that communicative activity does not impinge upon substantial governmental interests, it may not be suppressed. Defendant's conduct demonstrably did not impinge upon a substantial governmental interest.

I.

New York's "flag desecration" statute is unconstitutional on its face a) because constitutionally protected conduct may be swept within its ambit, b) because it is so vague and imprecise as to fail to apprise the public of the scope of its proscription and c) because it fails to provide adequate standards for enforcement.

A. *The Statute Is Overbroad Because Constitutionally Protected Conduct May Be Swept Within Its Ambit.*

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. See, generally, Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948). See, also, *People* v. *Katz,* 21 N. Y. 2d 132, 286 N. Y. S. 2d 839 (1967). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

New York's flag desecration statute issues just such an invitation. The statute provides that:

> "Any person who . . . shall *publicly* mutilate, deface, defile or *defy*, trample upon, or *cast contempt upon* either by *words* or act [an American flag or any repre-

sentation thereof] . . . shall be guilty of a misdemeanor." (Emphasis added.)

Therefore, under the terms of New York's statute, it would be unlawful to deliver a speech which could be construed as casting contempt upon the American flag or any representation thereof. Since New York City's Administrative Code requires an American flag to be displayed at all "street meetings",[1] New York's statute exposes all such street-corner orators to the scrutiny of local law enforcement officials to determine whether a given speech "casts contempt" upon or "defies" the displayed American flag. Moreover, the statute expressly prohibits verbal criticism of the flag by specifically prohibiting the utterance of words defying or casting contempt upon the American flag in public.

Thus, the following species of conduct would be vulnerable to prosecution under the statute:

a) A public speech in which the speaker argued that the American flag has come to be regarded as a symbol of oppression throughout the world.

b) A public speech in which the speaker renounced his allegiance to the United States and stated that he no longer bore respect for its flag.

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[1] Section 435-8.0(a) of the New York City Administrative Code provides:

"All assemblies, warranted by law, held in any of the streets of the city, where public discussions are held, shall have the American flag . . . conspicuously displayed at all times during the whole of such assembly and every parade or procession must have at or near its head the American flag . . . conspicuously displayed at all times during the formation of such parade or procession."

The constitutionality of that provision is not at issue in this case.

c) A public speech in which the speaker attacked the actions of the United States and remarked that the red stripes of her flag are stained with the blood of innocent people.

d) A public statement in which the speaker observes:

"We don't need no damn flag. If they let that happen to Meredith we don't need an American flag" (A-17).[2]

Additional examples of clearly protected conduct which would appear to violate the statute may be readily imagined. Since the statute purports to prohibit activity which indisputably merits First Amendment protection, it is invalid on its face. *Stromberg* v. *California,* 283 U. S. 359 (1931); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Watkins* v. *U. S.,* 354 U. S. 178 (1957); *Winters* v. *New York,* 333 U. S. 507 (1948).

In *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), this Court determined that the State of Washington's loyalty oath provisions were invalid because they were capable of overly broad construction. Mr. Justice White, speaking for the Court, stated:

"The range of activities which are or might be deemed inconsistent with the required promise [loyalty oath] is very wide indeed . . . Even criticism of the design or color scheme of the state flag or unfavorable comparison of it with that of a sister State or foreign country could be deemed disrespectful and therefore violative of the oath." 377 U. S. at 371.

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[2] In fact, it is unclear from the record below whether defendant's words or his actions were the basis for his conviction.

See also, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Similarly, criticism of the design or color scheme of the flag or unfavorable comparison of it with that of a foreign country could be deemed a "defiance of" or a "casting of contempt" upon the flag and, therefore, violative of the New York statute.

Since the New York statute, much as the Washington loyalty oath, sweeps within its ambit constitutionally protected as well as allegedly unprotected conduct, it is invalid on its face.

In *Stromberg* v. *California*, 283 U. S. 359 (1931), in reversing a conviction for unlawfully displaying a red flag, Chief Justice Hughes held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of the opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." 283 U. S. at 369.

Nor is the statute saved by the fact that it purports to prohibit conduct which may be arguably the subject of state regulation. Although this Court recognized the propriety of state statutes regulating breach of the peace, it did not hesitate to strike down two versions of such a statute which were sufficiently broad to interfere with

First Amendment conduct. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edward* v. *South Carolina*, 372 U. S. 229 (1963).

Finally, in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), Mr. Justice Brennan, speaking for the Court stated:

> "Thus [the statutes at issue therein] suffer from impermissible overbreadth. They seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with the First Amendment. Where statutes have an overbroad sweep, just as where they are vague, the hazard of loss or substantial impairment of those precious rights may be critical [Citing *Dombrowski* v. *Pfister*, 380 U. S. 479 at p. 486] since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." 385 U. S. at 609.

The overbreadth inherent in the New York statute is illustrated by the position taken by Attorney General Ramsey Clark in his memorandum to the Senate Judiciary Committee concerning the proposed federal flag desecration statute. Attorney General Clark stated:

> "Particular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt * * * either by word or act' upon the national flag is to risk invalidation. Such language reaches toward conduct which may be protected by first amendment guarantees. The courts have been insistent on guarding against sanctions which reach the protected expression of ideas and also have struck

down on grounds of vagueness provisions which are so broad that they might include protected speech along with conduct that could constitutionally be penalized.

These issues were not involved in *Halter* v. *Nebraska*, 205 U. S. 34 (1907) which upheld the power of a State to enact legislation with respect to the flag, but are suggested by more recent decisions of the courts dealing with other conduct involving manifestations of respect or disrespect for the flag and the system of government in [sic] represents."[*]

Senate Report No. 1287 (90th Cong. First Session) (Committee on the Judiciary).

B. *The Statute Is Vague and Imprecise.*

1. The statute fails to inform the public of the scope of its proscription.

This Court has consistently invalidated governmental regulations which failed to apprise the public of the scope of their proscriptions, e.g., *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). In *Lanzetta*, the Court explicitly recognized the existence of a constitutionally protected right "to be informed as to what the State commands or forbids." 306 U. S. at p. 453. It is impossible, however, to glean from the wording of New York's flag desecration statute what conduct the statute proscribes. The broad range of conduct to which the statute has been applied in New York illustrates the impossibility of ascribing a definite meaning to

[*] It is interesting to note that Congress evidently heeded the Attorney General's analysis, since the present version of the proposed legislation has abandoned the language to which the Attorney General objected.

its proscriptions.[4] In *People* v. *Place, et al.*, four actors were arrested under the statute for using a flag as a theatrical prop in a play critical of contemporary American values. The charges were ultimately dismissed on motion of the District Attorney of New York County on May 23, 1967. In *People* v. *Radich*, 53 Misc. 2d 717, 279 N. Y. S. 2d 680, aff'd w/o opinion —— Misc. 2d ——, —— N. Y. S. 2d ——, leave to appeal to New York Court of Appeals granted, —— N. Y. 2d —— (1968), a sculptor was convicted of violating the statute for using an American flag as part of his composition. In *United States Flag Foundation, Inc.* v. *Radich*, 53 Misc. 2d 597, 279 N. Y. S. 2d 233 (1967), the New York Supreme Court refused to dismiss an action for civil damages based upon the exhibition of sculpture utilizing the American flag.

Finally, in *People* v. *Duncombe* (Court of Special Sessions for Village of Liberty, New York) the defendant was accused of wearing an article of clothing in the form of an American flag. He was convicted of violating the statute in question and was sentenced to 30 days in jail and a fine of $50. He is currently free on bail pending appeal.[5]

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[4] For examples of desecration of the American flag which might fall under the statute's proscription, see N. Y. Times, March 24, 1967 at 25 col. 1; *id.*, April 15, 1957, at 36 col. 4; *id.*, April 16, 1967 at 1 col. 3; *id.*, April 19, 1967, at 3 col. 4; *id.*, April 20, 1967, at 23 col. 8; *id.*, May 13, 1967 at 17 col. 2; Life Magazine, March 31, 1967 at 18; N. Y. Times Dec. 30, 1966, at 2, col. 2, *id.*, May 21, 1967, section 2 at 33-35.

[5] Duncombe unsuccessfully sought to convene a three judge court to test the statute in question subsequent to his conviction in *Duncombe* v. *New York*, 67 Civ. 1085 (S. D. N. Y. April 12, 1967). Judge Bryan conceded that substantial constitutional questions were raised by the statute, but remitted Duncombe to his state appellate remedy before invoking Federal intervention.

The uncertainty inherent in the New York statute is particularly disturbing because it involves the realm of communication. When rights under the First Amendment have been at issue, this Court has demanded precise delineation of the duties of a citizen. *Saia* v. *New York*, 334 U. S. 588 (1948); *Winters* v. *New York*, 333 U. S. 507 (1948); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Smith* v. *California*, 361 U. S. 147 (1959). The effect of a vague and imprecise penal statute in the First Amendment area is to inhibit protected expression which the public fears *might* fall under the statute's purview. The decision of the trial court in *People* v. *Radich*, 53 Misc. 2d 717, 279 NYS 2d 680, graphically illustrates the danger in permitting imprecise statutes in the area protected by the First Amendment.

The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." 279 N. Y. S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to force a person to "gamble" on whether his form of expression is or is not permitted.

In *Smith* v. *California*, 361 U. S. 147 (1959), Mr. Justice Brennan, speaking for the Court stated:

> "[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." 361 U. S. at 151.

This potential stifling effect upon free expression has resulted in this Court's enunciation of the rigorous requirement of precision in the First Amendment area.

In *NAACP* v. *Button*, 371 U. S. 415 (1963), Mr. Justice Brennan, again speaking for the Court, stated:

> ". . . standards of permissible statutory vagueness are strict in the area of free expression. . . . these freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U. S. at 432-433.

See also *Keyishian* v. *Board of Regents, supra* at pp. 603-604; *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). New York's flag desecration statute fails to meet that requirement and is, therefore, invalid.

2. The statute fails to afford adequate standards for enforcement and administration.

A basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with overbroad discretion to determine whether or not given conduct falls within its purview. E.g., *Connolly, Commissioner* v. *General Construction Company*, 269 U. S. 385 (1926); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). The principle that adequate guidance must be afforded to government officials charged with a statute's enforcement is designed to protect against arbitrary and unequal enforcement of penal stat-

utes. Such a principle is, of course, doubly important in the sensitive area protected by the First Amendment.

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), this Court, in declaring Louisiana's vaguely defined breach of the peace statute unconstitutional, stated:

> "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted, and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." 379 U. S. at 557.

In *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), a broad, anti-picketing ordinance was declared unconstitutional because:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." 310 U. S. at 97-98.

In *Kunz* v. *New York*, 340 U. S. 290 (1951), *Niemotko* v. *Maryland*, 340 U. S. 268 (1951) and *Staub* v. *City of Baxley*, 355 U. S. 313 (1958), this Court invalidated licensing regulations in the First Amendment area because they failed to provide adequate standards to guide local officials in the exercise of their discretion. This Court has understood that any vague and imprecise penal statute in the First Amendment area becomes, in effect, a licensing provision, permitting only that expression which local officials will tolerate to flourish.

Finally, in *NAACP* v. *Button*, 371 U. S. 415 (1963), the Court stated:

> "The objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." 371 U. S. at 433.

Therefore, New York's flag desecration statute is invalid on its face a) because it purports to outlaw protected as well as allegedly unprotected conduct, b) it fails to afford adequate warning to the public of the scope of its proscription and c) it fails to provide adequate standards for enforcement and, therefore, is susceptible to arbitrary and discriminatory enforcement.

It may be argued that the "void for vagueness" doctrine ought not to be invoked in this case because the public officials of the State of New York may be relied upon to enforce the statute in good faith without ascribing an overbroad construction to its proscriptions. The unhappy application of the statute in the *Radich*, *Duncombe* and *Place* cases, *supra*, certainly casts grave doubt upon any promises of "narrow" construction. In *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), Mr. Justice White, responding to a similar argument, stated:

> "The State labels as wholly fanciful the suggested possible coverage of [the statute] . . . It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well inten-

tioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U. S. at 373.

Even if no prosecutions were brought at all under New York's flag desecration statute, its very existence and the recognition of the possibility of potential prosecution would serve as a pervasive restraint upon any conduct which might be construed as falling under the statute's purview. Since much of that conduct would be clearly protected by the First Amendment, the mere existence of the statute casts a shadow over the full enjoyment of First Amendment right and it is, therefore, invalid.

Finally, it may be contended that since the defendant herein engaged in conduct which was unquestionably covered by New York's statute,* he may not invoke the void for vagueness doctrine. However, this Court has, on numerous occasions, expressly refused to permit the application of the void for vagueness doctrine to be confined to those persons who were actually confused by a statute's imprecision or whose conduct could not, even under a narrow statute, be constitutionally proscribed.

In *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), Mr. Justice Murphy, speaking for the Court, stated:

"... Proof of an abuse of power in the particular case has never been deemed a requisite for attack upon the constitutionality of a statute purporting to license the dissemination of ideas. ... Rather it derives from an

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* As has been noted above, it is unclear whether the defendant was convicted for his words or for his acts, or for a combination of both. If his words constituted an element of his conviction, or might have constituted an element of his conviction, *Stromberg* v. *California,* 283 U. S. 359 (1931) would require a reversal of his conviction on those grounds alone.

> "appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.
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> *An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced, against him.*" 310 U. S. at 98. (Emphasis added.)

In his concurring opinion in *Niemotko* v. *Maryland*, 340 U. S. 268, 273 (1951), Mr. Justice Frankfurter discussed the application of the void for vagueness doctrine to specific instances of allegedly "hard core conduct":

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken." 340 U. S. at p. 285.

See also, *Winters* v. *New York*, 333 U. S. 507 (1948); Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 Harv. L. Rev. 1208 (1948).

Thus, the fact that the defendants' conduct might have been proscribed by New York under a narrow, carefully drawn statute, does not insulate the overbroad and vague statute at issue in this case from the operation of the "void for vagueness" doctrine. Its overbreadth and vagueness render it a threat to the robust exercise of First Amendment freedoms. As such, it must not be permitted to stand.

II.

New York may not constitutionally impose criminal sanctions upon a person accused of publicly destroying or damaging an American flag in an attempt to dramatize his dissatisfaction with social conditions existing within the country.

Free trade in ideas is perhaps the single most important attribute of the American experiment in government. In preserving that precious attribute, this Court has been called upon to decide a series of cases in which traditional forms of idea transmission have been abandoned and new, more dramatic forms have been invoked. See, *e.g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); *O'Brien* v. *U. S.*, 36 U. S. L. W. 4469 (1968); *Garner* v. *Louisiana*, 368 U. S. 157, 201 (1961) (Harlan, J., concurring); *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Adderly* v. *Florida*, 385 U. S. 39 (1966). From these cases has emerged a distinction between "pure" speech, encompassing the more traditional forms of idea transmission such as speech making, writing and pamphleteering, and "symbolic" speech, encompassing newer forms of idea transmission

such as picketing, sit-ins, pantomimes and the destruction of symbolic objects. See, Kalven, *The Concept of the Public Forum* (*Cox* v. *Louisiana*), Supreme Court Review (1965). While "pure" speech continues to enjoy a highly protected status, "symbolic" speech may be subjected to far more rigorous control. *O'Brien, supra.* Essentially, therefore, a basic distinction has emerged between communication effected by verbal transmission of ideas and communication effected by non-verbal, visual methods of idea transmission. Non-verbal, visual methods of idea transmission have been characterized as conduct and not afforded the nature of the constitutional protection afforded to verbal communication. It is respectfully suggested that such a mechanical distinction does not aid this Court in resolving the difficult questions of how best to preserve the free transmission of ideas and, at the same time, maintain the required degree of public order. To distinguish between symbolic and non-symbolic communication is to erect a wholly arbitrary boundary.

All communication is basically symbolic. Language, the medium of traditional communication, is nothing more than a highly developed set of abstract symbols. The *Encyclopedia Britannica* defines language as:

> "An arbitrary system of vocal symbols by means of which human beings, as members of a social group and participants in a culture, interact and communicate." 1965 *ed.*, volume 13, p. 696.

Julius Lippert, in discussing language, stated:

> "A word brings the idea to mind nearly as sharply and clearly as does the object itself and it evokes a response like that produced in the savage by any sense impression." Lippert, *The Evolution of Culture* (1931) 16.

The development of hieroglyphs, the pictographic antecedent of our notion of verbal symbols, illustrates how inextricably intertwined "pure" speech is with the "symbolic" method of communication. Since all communication is basically symbolic, we must determine what form of symbolic traffic in ideas, that is, communication, may be suppressed in order to preserve the required degree of public order. Note, *Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040 (1968). In attempting to answer that extraordinarily difficult question, it would be appropriate to investigate the following areas:

1. Did the Conduct in Question Have Secondary Effect[1] Apart from the Communication of Ideas?
2. Do the Secondary Effects of the Act of Communication Impinge Upon a Substantial Governmental Interest?
3. Is the Governmental Regulation in Question Neither Broader nor More Stringent than Necessary to Protect the Substantial Governmental Interest?

If the sole effect of a person's conduct is the transmission of ideas, such conduct should be absolutely protected from governmental regulation. However, if a person's conduct, in addition to effecting a transmission of ideas, has some secondary effect, appropriately narrow governmental regulation of the secondary effect's impact upon substantial government interests would, of course, be permissible.

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[1] The secondary effect created by certain conduct designed to transmit ideas may be analogized to the concept of "by-products" associated with the manufacture of many chemical products. It is these "by-products" which are subject to appropriate governmental regulation.

Certain acts of communication such as writings or speech seldom, if ever, possess secondary effects apart from the communication of ideas. They create no "by-products." Therefore, they are almost never subject to governmental regulation. Certain other acts of communication, such as picketing or sitting-in, inexorably create secondary effects apart from their communicative content and are subject to regulation to control the impact of such "by-products" upon substantial governmental interests. *Adderly* v. *Florida*, 385 U. S. 39 (1966). Does the act of flag burning, when intended solely as an act of communication, have a secondary effect apart from the communication of ideas which renders it subject to criminal sanction?[7a]

The secondary effect of the act of communication decleared unprotected in *O'Brien* v. *U. S.*, 36 USLW 4469 (1968), was the inevitable non-possession of a draft card. Since the Court determined that the government possessed a substantial interest in requiring young men to possess their draft cards, it concluded that the inevitable by-product of the act of communication could justify governmental regulations aimed at insuring possession. However, no such secondary effect attaches to the communicative act at issue in this case. There is no inevitable frustration of a governmental interest similar to the interest present in *O'Brien* inherent in the desecration of a flag. Certainly, no one could argue that there is any legitimate govern-

[7a] *Halter* v. *Nebraska*, 205 U. S. 34 (1907) is not instructive on this issue. *Halter* dealt solely with the power of a state to legislate concerning commercial exploitation of the flag. It did not deal with the use of the flag in connection with political discussion. In fact, *Halter* was decided some 25 years before this Court held the First Amendment applicable to the states. Cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951) with *Martin* v. *Struthers*, 319 U. S. 141 (1943).

mental interest in compelling possession of or in enforcing veneration for the flag of the United States. *West Virginia* v. *Barnette*, 319 U. S. 624 (1943). Therefore, this case is clearly distinguishable from *O'Brien*.

Although the "by-product" of the communicative act in *O'Brien* is not present in this case, we must determine whether any other "by-product" justifying regulation is present.

One such possible "by-product" is that the destruction of a flag is an affront to the symbolic sovereignty of the State. In his decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice Frankfurter embraced the "symbolic sovereignty" concept when he stated:

> We live by symbols. The flag is the symbol of our national unity transcending all internal differences, however large, within the framework of the Constitution. 310 U. S. at 596.

Justice Frankfurter went on to hold in *Gobitis* that the symbolic nature of the flag justified a regulation requiring compulsory flag salutes, even if such salute constituted a violation of a person's religious beliefs. However, the notion that the symbolic nature of the flag could form the pretext for a suppression of otherwise constitutionally protected conduct was abandoned three years later in *West Virginia* v. *Barnette*, 319 U. S. 624 (1943), when this Court, reversing *Gobitis*, held that compulsory flag salutes violated the First Amendment to the Constitution.

Mr. Justice Jackson, writing for this Court in *Barnette* explicitly rejected the argument that the symbolic nature of the flag conferred upon it some sort of talismanic im-

munity from the reach of the First Amendment. Holding that compulsory flag veneration was unconstitutional, he wrote:

> "There is no mysticism in the American concept of the State or of the nature or origin of its authority . . . . The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." 319 U. S. at 641-642.

Thus the fact that flag destruction is in some metaphysical way an affront to our symbolic sovereignty cannot and ought not to form a basis for punishment. For if we concede that there are certain political symbols which are above desecration, we open the door to drastic suppression of our right to criticize the state. There is no logical differentiation between burning the flag and burning an effigy of the President. Our flag is really the effigy of a nation. As such, it is not immune from symbolic criticism. *West Virginia* v. *Barnette, supra,* at 632.

The second possible secondary effect of flag desecration is the creation of public disorder.[8] Certainly actions which will inevitably cause an *imminent* danger of a breach of the peace may be regulated, even though they are communicative acts. *Chaplinsky* v. *U. S.*, 315 U. S. 568 (1942).[9] However, the nexus between a communicative act and the imminent danger of a breach of the peace must be very close indeed to justify regulation. Compare *Feiner* v. *N. Y.*, 340 U. S. 315 (1951) with *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). The mere fact that a given communicative act may displease onlookers and even rouse them to anger does not justify the prohibition of such an act. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

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[8] It is this secondary effect which formed the basis of Judge Fuld's decision below.

[9] The statute at issue in *Chaplinsky* rendered illegal the use of insulting words in public likely to cause a breach of the peace. Mr. Justice Murphy, in sustaining the conviction, stated that when applied to "fighting words" the statute was constitutional. The words involved in *Chaplinsky* were specific insults directed against a specific individual. As such, they closely resembled private libel. There was no intent in *Chaplinsky* on the part of the defendant to offer public criticism of the issues of the day. Thus, it is not surprising that the defendant's conduct was held to be unprotected. If, however, the words in question had not been directed at a specific individual and had been intended to offer public comment upon the problems of the day, it is not at all certain that the same result would have followed. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). In fact, in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964) and *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964) this Court drastically narrowed the constitutional scope of criminal libel laws when comment upon the issues of the day is involved. Thus, the fact that the defendant's actions in this case were truly "public" in character, as opposed to the "private" nature of the *Chaplinsky* conduct, and were intended to offer comment upon the issues of the day, render *Chaplinsky* inapplicable as a precedent for suppression. If anything, this case is closer to the principles enunciated in *Times* v. *Sullivan* and *Garrison* v. *Louisiana*, *supra*.

To permit the fear of hostile reaction to found the basis for suppression, in advance, of the transmission of certain ideas strikes at the very heart of the First Amendment. We cannot permit the emergence of a doctrine of "political obscenity" which renders certain communication unprotected merely because it may have an adverse emotional impact upon a hostile audience. *Cox* v. *Louisiana, supra; Edwards* v. *South Carolina, supra.*

Would an ordinance prohibiting the public discussion of interracial marriage in a small Southern village be constitutional merely because village authorities feared that it might result in a breach of the peace? Certainly not. The First Amendment could not long survive the existence of a "heckler's veto."

A crucial indicia of a truly free society is the manner in which it responds to attempts to render certain idea transmission illegal, not because such conduct is in itself harmful, but because it *may* lead to other conduct which would be harmful. In the present case we are faced with an attempt to render flag burning illegal because it may lead to something worse, that is, a breach of the peace. In the delicate area of free expression, this Court has uniformly required a showing that communicative conduct must be almost inevitably likely to lead to the feared greater evil before such communication may be suppressed.

The basic rationale of the "clear and present danger" doctrine enunciated by this Court is that communicative conduct may not be suppressed merely because it *might* lead to a substantive evil. See, *e.g., Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); *Schenck* v. *United States,* 249 U. S. 47 (1919). More than a mere possibility is required.

In *Garrison* v. *Louisiana*, 379 U. S. 64 (1964) this Court reversed a criminal libel conviction under a statute which permitted punishment of malicious statements, even if true. The Court held that Louisiana's rejection of a clear and present danger test as a guide to the application of its criminal libel statute to criticism of public officials rendered the statute unconstitutional. New York has likewise rejected a clear and present danger test in applying its flag desecration statute by outlawing all flag desecration, even when no danger of a breach of the peace is occasioned. The New York statute at issue herein is premised upon an abstract determination that the communicative conduct in question may be absolutely suppressed because it *might* lead to a breach of the public peace.[10] Such a determination is a perversion of the ordinary requirement that communicative activity may be suppressed only when a substantive evil is actually imminent. That such a substantive evil was not imminent in the instant case is clearly demonstrated by the acquittal of the defendant of the charge of disorderly conduct (A-25). In effect, the trial court found that no imminent danger of a breach of the peace existed.[11] Since there was no danger of a breach of the peace surrounding the defendants' communicative act, it should not be subject to governmental suppression. The abstract determination,

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[10] If the statute were phrased or construed in terms of prohibiting flag burning only when it would cause an imminent danger of a breach of the peace, of course, this objection would disappear. However, the construction placed upon the statute by New York's highest court renders all flag burning illegal, whether or not it would cause an imminent danger of a breach of the peace.

[11] Section 722 of the Penal Law, in effect at the time of appellant's conviction, required a finding of conduct tending to induce an imminent breach of the peace. Section 722 has been superseded by Section 240.20 of the Penal Law.

in advance, that all flag desecration is illegal, without regard to the actual imminence of public disorder, comes dangerously close to a "prior restraint" on communication. *Near* v. *Minnesota*, 283 U. S. 697 (1931). Such suppression is a prime example of permitting a governmental regulation to become so broad that it ceases merely protecting the governmental interest and unduly impinges upon the communicative act itself.

Thus, since the communicative act involved in this case did not in fact create "by-products" that endangered any substantial governmental interest, it cannot be suppressed.

It is no coincidence that this Court has been confronted during the past decade with a number of cases in which traditional forms of idea transmission have been eschewed in favor of new, more dramatic forms of communication. The rise of these new forms of communication is attributable to a recognition by many persons that the traditional methods of idea transmission are not sufficient in today's world to insure the maintenance of a free market place of ideas in which the truth and reason can ultimately prevail. See, *e.g.*, *Abrams* v. *United States*, 250 U. S. 616, 630 (1919).

Two concurrent factors, both ultimately traceable to the revolution in communications technology which has occurred since the end of World War II, have impelled the rapid rise of the new forms of communication. First, the extraordinary power over the dissemination of ideas which is exerted by the mass media; and second, the gradual ascendency of visual (and therefore non-verbal) forms of communication.

A. *The Power of Mass Media*

Traditionally, we have accepted the doctrine of John Stuart Mill that ideas must be permitted to compete freely in the marketplace in order for truth and reason to prevail. See, *On Liberty, Essential Works of John Stuart Mill* (1965) 295; *First Inaugural Address of Thomas Jefferson,* in Koh and Peden, *The Life and Selected Writings of Jefferson* (1944) 321; *Abrams* v. *United States, supra.*

In recent days, however, there are those who have contended that the intellectual free market of Mill is as moribund as the economic free market of Adam Smith. Each was killed, they assert, by accretions of competitive power which destroyed the ability of smaller units to compete effectively. Herbert Marcuse, a leading critic of the marketplace of ideas concept, has written:

> "The underlying assumption is that the established society is free, and that any improvement, even a change in the social structure and social values would come about in the normal course of events, prepared, defined, and tested in free and equal discussion, in the open marketplace of ideas . . . ."
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> "With the concentration of economic and political power and the integration of opposites in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge: in the formation of opinion, in information and communication, in speech and assembly." Marcuse, *Repressive Tolerance in A Critique of Pure Tolerance* (1965) 92-97.

Marcuse's reasoning is seductive and his criticisms cannot be lightly dismissed. According to Marcuse, the dissenter who cannot afford access to television time or space in a mass periodical is simply not able to gain the attention necessary to communicate effectively with masses of people and is therefore shut out from effective participation in the marketplace of ideas. In fact, we have witnessed a distressing trend toward oligopolistic control of mass organs of communication. See, generally, Rucker, *The First Freedom*, (1968); Liebling, *The Press* (1961). Few persons can hope to surmount the economic barriers which bar many persons from access to the mass media. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

However, a people steeped in the traditions of democracy, a people dedicated to the principle that truth and reason will prevail so long as ideas may be freely transmitted, have intuitively responded to the danger posed by the problem of inadequate access to the mass media by evolving new, more dramatic forms of communication, which not only possess a greater impact upon the persons in the immediate vicinity, but also, and even more importantly, unlock the key to the mass media as well.[12] For the very occurrence of the more dramatic form of communication becomes a newsworthy item and, therefore, reported by the mass media. Thus, these new forms of communi-

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[12] Jerome Barron has written:

"The failures of existing media are revealed by the development of new media to convey unorthodox, unpopular and new ideas. Sit-ins and demonstrations testify to the inadequacy of old media as instruments to afford full and effective hearing for all points of view. Demonstrations it has been well said are 'the free press of the movement to win justice for Negroes.'" *Barron, supra,* at 1647.

cation have been of crucial significance in preserving and strengthening the free market of ideas. The special significance of unconventional forms of protest, such as flag burning, is that they provide a method of intellectual "pump-priming" which rejuvenates, much as Keynesian economics rejuvenated the economic free market, the intellectual free market in ideas. Unless such intellectual "pump-priming" is protected and encouraged, the contentions of critics such as Professor Marcuse that the free market in ideas is nothing more than a romantic myth will appear to contain a semblance of truth.

B. *The Ascendancy of Visual Communication*

The invention of the printing press ushered in a revolution in communications which dominated the transmission of ideas for centuries. The printed word became the primary vessel for informing and influencing the Western world. However, the primacy of the printed word has been challenged in the second half of the twentieth century by the dramatic rise of visual communication. Commentators such as Marshall McLuhan[13] have chronicled both the rise of visual communication to a position of ascendancy and its concurrent impact upon the transmission of ideas. McLuhan's axiom that "the medium is the message" is a shorthand statement of the principle that the form in which a communication is couched has as great an impact upon its efficacy as does the communication's content. As the nation becomes more and more conditioned to receiving its communication by visual rather than written modes, the new methods of communication which have confronted this

[13] McLuhan, *Understanding Media* (1964); Lacy, *Freedom and Communication* (1961).

Court and which are essentially visual in nature take on greater importance. For if, in fact, "the medium is the message," or at least an important ingredient of the message, this Court has responsibility to insure that new, visual forms of communication receive the protection to which they are entitled.

This Court has not hesitated to accord protection to newly evolved forms of visual communication. Mr. Justice Clark, writing for the Court in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), held that motion pictures were entitled to First Amendment protection. Justice Clark stated:

> ". . . the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment . . . secures to any form of 'speech' or 'the press.'
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> It cannot be doubted that motion pictures are a significant medium for the communication of ideas.
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> . . . we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendment." 343 U. S. at 501-02.

This Court should be alert to the communications revolution now occurring on its doorstep and accord protection to the newly evolving, non-violent forms of visual idea transmission.

CONCLUSION

The statute in question should be declared unconstitutional and the defendant's conviction reversed.

Respectfully submitted,

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